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SUMMARY RECORD OF THE FIRST PART (PUBLIC)* OF THE 1797th MEETING

Held at the Palais des Nations, Geneva,
on Wednesday, 27 October 1999, at 10 a.m.

Chairperson: Ms. MEDINA QUIROGA

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The meeting was called to order at 10.20 a.m.

GENERAL COMMENTS OF THE COMMITTEE (agenda item 7) (continued)

Draft general comment on article 4 of the Covenant (CCPR/C/66/R.8)

1. Mr. SCHEININ, introducing the draft general comment on non-derogable rights, said that the existing general comment on article 4 (general comment 5) dealt only with the official proclamation of states of emergency. The present draft had been prepared in an attempt to address a major problem in the human rights regime, namely the "grey zone" between human rights law and situations where humanitarian law became applicable. Human rights instruments appeared to allow for far-reaching derogations during states of emergency that did not qualify as armed conflicts. There appeared to be insufficient protection of fundamental rights in such situations. The draft general comment therefore addressed the question of whether the Covenant itself could provide greater protection for fundamental rights during states of emergency than that provided by simply specifying rights listed as non-derogable in article 4, paragraph 2 of the Covenant.

2. Referring to paragraph 2 of the draft, he said that it did not define states of emergency or situations which amounted to states of emergency justifying derogation of rights. Some authorities argued that the "grey zone" between human rights law and humanitarian law could be avoided by a restrictive interpretation of what constituted a state of emergency justifying derogation under the Covenant - for example, one that was covered by common article 3 of the Geneva Conventions. However, article 4 was clearly intended to apply to situations other than ones covered by the Geneva Conventions, and the question was what rights could be derogated from in crises other than armed conflicts.

3. In connection with paragraph 3 of the draft, he said that the clause "to the extent strictly required by the exigencies of the situation" was the basis for the view that derogation did not mean suspension of rights, but a specific regime of limitations additional to those applicable under normal conditions and subject to specific monitoring to ensure that they did not exceed those "exigencies". That also made it possible for the Committee to be more active in monitoring derogation of rights during states of emergency.

4. Paragraph 4 of the draft started from the premise that certain provisions of the Covenant were listed as non-derogable in themselves. The suggestion was that elements of other provisions might also be non-derogable even though the provisions might not be in their entirety.

5. Paragraph 6 aimed to broaden the approach to non-derogable rights on the basis of the provisions of article 4, paragraph 1, of the Covenant. Interpretation of "their other obligations under international law" might vary, but the draft assumed that the phrase referred to fundamental rights that were intended to be applicable during states of emergency and did not imply that rights were non-derogable merely by virtue of their inclusion in another human rights instrument. It was a question of interpreting whether relevant humanitarian law and human rights instruments were intended to be applicable during states of emergency.

6. The major innovation in the draft general comment was to be found in paragraph 12, which was an attempt to use article 4 of the Covenant to show that other rights in the Covenant besides those listed in article 4, paragraph 2, contained elements that were non-derogable.

7. Paragraphs 13 to 15 dealt with procedural protection. The position taken in the draft could be compared with the position taken by the Inter-American Court of Human Rights in a number of advisory opinions based on the Inter-American Convention on Human Rights, whose text differed somewhat from that of the Covenant. That position extended the non-derogable nature of certain rights to all procedural guarantees essential for the protection of those rights. While the draft did not take exactly the same position, it did discuss what kinds of procedural protection should be seen as non-derogable.

8. A question not addressed in the draft general comment was the role of non-State actors. That was certainly a question of relevance to the debate on fundamental standards of humanity, but the Covenant did in fact relate to the responsibility of State parties and the monitoring mechanisms were applied to States. Lastly, he referred to a position paper submitted by the Association for the Prevention of Torture, which took a somewhat different approach. Most of the points it raised were covered by the draft general comment. Point 2 of the position paper was based to some extent on an incorrect identification of derogation with suspension. The paper also raised the question of model legislation on states of emergency. The Committee had touched on that point in the past and it might be advisable in the future to prepare a general comment on what rights States parties should proclaim non-derogable under their Constitution or legislation.

9. Ms. EVATT said a new general comment on article 4 should replace general comment 5 and should therefore deal with points from that general comment not included in the draft. Some mention should be made of States parties' reporting practices. There was not enough on what was expected in States' reports or on their constitutional and legislative practice as revealed by the consideration of those reports.

10. The CHAIRPERSON invited Committee members to put their detailed comments in writing in advance of the March meeting of the working group.

11. Mr. KLEIN said the question of the relationship between non-derogable rights and peremptory norms, referred to in paragraph 8 of the draft, would require more thought.

12. Most of the rights enshrined in the Covenant were subject to limitations, whether they were derogable within the meaning of article 4 or non-derogable under article 4, paragraph 2. It was a matter of proportionality, an issue that had implications at several levels, including article 4 itself. The question of the interplay between the principle of proportionality under normal circumstances (i.e. circumstances not covered by article 4) and derogation was one that the draft general comment should address.

13. With regard to the relationship between derogation and suspension, the concept of suspension must be considered in a context of human rights. Any

limitation amounted to at least a partial suspension. Did suspension mean that the right as such could not be exercised? The issue was not at all clear.

14. The question of whether non-derogable rights existed other than those listed in article 4 raised the question of how far the Committee could go in supplementing the Covenant by reference to other sources of international law. Mr. Scheinin had mentioned article 12 as a non-derogable right that was not listed, but he had come to that conclusion by taking account of other sources of international law. The point needed serious consideration, because it was not clear whether the Committee could, so to speak, insert non-derogability into the Covenant itself by reference to other sources of law.

15. Lastly, he agreed that both articles 4 and 2 must logically be non-derogable.

16. Mr. HENKIN said that he had doubts as to the breadth of the concept of threats to "the life of the nation". To interpret it as referring to external attack was to limit it. Natural disasters also posed a threat - but in most cases not to the life of the nation. On the other hand, not only natural disasters but also terrorism often posed a threat to a region. Regional disturbances were often dealt with by the imposition of martial law, yet that was not the same as a state of emergency. The interrelationships between such concepts needed examining.

17. In the area under discussion, States must inevitably be given what was frequently referred to as a margin of appreciation, but the Committee must stress that the margin of appreciation was subject to an international standard. Article 4 was just such an international standard and consequently a possible basis for bringing cases before the International Court of Justice. The Committee must keep that in mind when interpreting it.

18. Concerning possible inconsistencies with other international instruments, it was true that the Committee could not scrutinize every bilateral treaty, but it could look at general treaties in the humanitarian field, including the Charter of the United Nations, to see whether derogation was consistent with their provisions.

19. The CHAIRPERSON, speaking in her personal capacity, said it would be preferable not to use the term "margin of appreciation", which might give States the wrong idea. She was not sure she agreed that derogation did not mean suspension: the word in Spanish for derogation was "suspensión". It was the substance underlying the word that must be stressed, not the word itself.

20. She was not worried about whether there were non-derogable rights not covered in article 4, paragraph 2, of the Covenant. Article 4 did indeed list a number of rights but it also stated that derogation was permissible "to the extent strictly required by the exigencies of the situation", meaning that there were some rights from which no derogation was allowed, because the situation did not require it. Additional non-derogable rights could, in her view, be adduced even without referring to other treaties, on the basis of the distinction between procedural rights and substantive rights. The Committee might also consider which elements of article 14 might be non-derogable.

21. In her own region, article 4 had been used often enough to illustrate the need to create an international standard to be upheld before courts - for example, the Inter-American Court of Human Rights. In a recent consultative opinion, that Court had given an interpretation of article 14 of the Covenant in reference to whether the right of a foreigner to be informed of the right to consult with counsel was part of the procedural guarantees of the accused.

22. Mr. ANDO congratulated Mr. Scheinin on his thorough treatment of a very difficult issue. He welcomed Ms. Evatt's suggestion about the inclusion of references to the Committee's own experience with countries that claimed to be undergoing states of emergency. He also endorsed Mr. Scheinin's suggestion that State parties should be requested to provide additional information about domestic provisions on states of emergency, which would facilitate comparison with the Covenant provision and the formulation of recommendations.

23. The Committee had been careful not to refer to a "margin of appreciation" because of the danger that States might use it as a pretext for the proclamation of states of emergency. Instead, it referred to the "minimum standards" contained in the Covenant. The Committee would have much to consider in seeking to expand the scope of article 4 as it applied to public emergencies threatening the life of a nation.

24. He did not agree that the Committee must take into consideration provisions in treaties other than the Covenant that referred to states of emergency; it could, however, refer to them and study them. Other sources of international law could likewise be reviewed. The main objective of the general comment, however, must be the interpretation of article 4 of the Covenant.

25. As to whether the concept of non-derogable rights could be expanded to cover the rights mentioned in article 14, he recalled that the Sub-Commission on the Promotion and Protection of Human Rights had suggested that the Committee should do just that, but it had decided not to. The Committee must look at the rights covered in article 14 as well as in article 18. In its general comment 24 on reservations, the Committee had indicated that there were certain rights on which no reservations should be made. A distinction must thus be drawn between certain rights which must be in no way restricted and the non-derogable rights in article 4, paragraph 2, of the Covenant.

26. Lastly, the Committee must give thorough consideration to the relationship between reservations and non-derogation before reaching any conclusion.

27. Mr. AMOR congratulated Mr. Scheinin on his remarkably thought-provoking work. Article 4, paragraph 2, was one of the most important - and most dangerous - of all the provisions in the Covenant. It pursued two goals which proved mutually exclusive in some situations: to preserve certain fundamental human rights, even in states of emergency, but also to preserve the life of the nation. The Committee should reflect on the use made, not so much of states of emergency in strictly legal terms, but rather of the exceptional powers conferred by such situations. Sometimes they served simply to justify

systematic violations of human rights. The phenomenon had been observed in a number of States, including one which had had a state of emergency in force for over 30 years, from 1965 until quite recently.

28. Sometimes exceptional powers were truly required to ensure the survival of a nation. It would be interesting to see statistics on exactly which States parties had used the procedure under article 4, paragraph 3, and which had instituted exceptional powers without recourse to that provision. He suspected that it was primarily young States, those in the third world, that gave themselves exceptional powers, whether to set up a dictatorship or to ensure the survival of the nation. In Africa and Asia, the existence of the nation was much more theoretical than real. The life of the nation was simply the coexistence, with minimal damage, of communities with glaring differences in economic, ethnic and religious terms.

29. The situation became even more complex when third parties had political or economic interests in preventing the formation of a nation. They were often quite able to proclaim their desire to uphold human rights while shattering the nascent structure of the nation. Recent history gave several examples: Biafra, Katanga and, on three occasions, Shaba. The dissolution of certain entities that had already suffered too much from colonial domination, did not advance the cause of human rights, but rather facilitated political and economic domination. Hence the need to ensure respect for human rights, meaning in some cases that the door must not be left open to foreign domination or the anarchy that was the antithesis of human rights.

30. Article 4, paragraph 1, indicated that measures taken in states of emergency must not be inconsistent with obligations under international law and must not involve discrimination on the ground of race, colour, etc. That must be interpreted with a view to highlighting what must be respected in all circumstances, irrespective of the nation's degree of political integration. It would be counterproductive to go beyond the Covenant, for in seeking to bring in all possible elements of international law, the Committee might provoke a negative reaction which could serve as an opportunity to reject and violate human rights. The interpretation of article 4, paragraph 2, must be done in such a way that the rules set out therein were given the best possible chance of being applied. A balance must be struck, obviously with the Covenant, but also with the need to preserve the right of people to self-determination and not to be treated as puppets in a self-interested interpretation of human rights.

31. Mr. LALLAH said Mr. Scheinin had produced an intelligent working paper that forced the Committee to consider a number of complex matters. Words had a habit of acquiring a life of their own. The problem was not whether the term suspension was more suitable than derogation, but rather what the consequences were. The Committee should reconcile itself to using the term derogation, but it should be understood to mean suspension over time.

32. What did the state of emergency actually signify in the context of the Covenant? Did it include military law, for example? The Committee must look at the facts and determine whether it covered situations that deviated from or completely upset the legal order. Those who favoured a restrictive interpretation of article 4 might suggest that it presupposed the existence of

a legal order, in that it referred to a public emergency that was "officially proclaimed". But what happened with the kind of military regime where the State had resorted to the grossest kinds of violations of human rights in order to take power - in Chile and Nigeria, for example - in clear violation of article 25 or other provisions of the Covenant, but had remained States parties to the Covenant and members of the international community? The Committee was required to consider those States as States parties, but what really mattered was the people concerned. That was why a strictly legalistic interpretation of the Covenant was not advisable; in reality, it was through international pressure flowing from the Covenant and other instruments that change to a legal order was induced.

33. He would have no difficulty with the Committee's referring to other international instruments by way of interpretation of the Covenant. For example, the way other international legal norms used the concepts of life of the nation, the extent to which emergency measures were required by a country's situation and consistency with obligations under international law could be studied. There was a wide field for the purposes of interpretation and the Committee should not hesitate to delve into it.

34. Mr. YALDEN congratulated Mr. Scheinin on a thorough piece of drafting work. It would certainly be useful to push States to give more information on situations that corresponded to the public emergency mentioned in article 4. Expanding on the notion of the threat to the life of the nation was likewise important and it would also be worthwhile to look into the terms of other treaties, although he shared Mr. Klein's misgivings on that subject.

35. The most important point, however, was how far the Committee could expand the list of non-derogable rights beyond what was stated in article 4, paragraph 2. He agreed that the substantive rights in part II of the Covenant qualified as non-derogable rights. The Committee should indeed strive to establish an international standard that would have an influence in situations when treaty rights were suspended. When adopting the general comment, however, the Committee must be very convincing, particularly to the legal branches of foreign ministries throughout the world. A reaction such as the one to general comment 24 on reservations must be avoided: it would not be desirable for the Committee's views to be shunted aside as being extreme or beyond its competence. That did not mean, however, that the Committee should not be forthright, imaginative and courageous in drafting its general comment on article 4.

36. Mr. BHAGWATI thanked Mr. Scheinin for an excellent document. He regarded article 4 of the Covenant as extremely important because of the numerous instances in which the concept of public emergency had been used, or rather abused, by unscrupulous rulers who felt power slipping away from their hands. In developing countries, in particular, people who had once claimed to be fighting for freedom had not hesitated, if their own power was threatened, to resort to the same weapons as the colonial rulers who had preceded them. In his own home region of south Asia, public emergencies had been declared and international obligations derogated from in a number of States, including India, Bangladesh and Pakistan.

37. While appreciating the concerns expressed by previous speakers, he believed that the Committee should concentrate on narrowing down the concept of a "public emergency which threatens the life of the nation", a concept which had been used in a flexible manner on many occasions. As for the precise meaning of the terms "derogation" and "suspension", he believed that the term "derogation" as used in article 4 must be understood in the very narrow sense defined by the words "to the extent strictly required by the exigencies of the situation". In conclusion, he explained that the remarks he had just made were by way of general comments on Mr. Scheinen's draft; there were many specific issues to be taken up when the draft was considered paragraph by paragraph.

38. Mr. WIERUSZEWSKI, associating himself with the compliments addressed to the author of the draft, said that, like some earlier speakers, he came from a country which had experienced a period of public emergency; at the time, he had been approached with a request to produce a legal justification for the imposition of martial law, which he had refused to do. In its general comment on article 4 the Committee should not, in his view, be overambitious but should follow Mr. Scheinin's lead in concentrating on the issue of non-derogable rights. While fully aware of the problems referred to by Mr. Lallah and Mr. Amor, he felt that the Committee's main purpose should be to try to identify those rights, leaving aside other aspects of the issue, including that of the meaning of the words "public emergency which threatens the life of the nation".

39. Mr. SOLARI YRIGOYEN expressed appreciation to Mr. Scheinin and said that his home region, too, had known many instances of public emergency being proclaimed in order to enable a ruler to seize absolute power. In fact, many Latin American countries had lived or were living under a constant state of emergency. He therefore agreed with Mr. Bhagwati on the importance of conducting a close analysis of paragraph 1 of article 4. As to the equally important issue of non-derogable rights covered in paragraph 2 of the article, he emphasized that States had obligations not only under the Covenant but also under other international and regional human rights instruments. The provision in paragraph 2 could, in his view, be expanded to include other rights, and in particular the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (Covenant, art. 10, para. 1).

40. Mr. SCHEININ welcomed the Chairperson's suggestion that members should send their comments to him in writing so as to enable him to prepare a new draft for consideration at the sixty-eighth session. If possible, comments should reach him by the end of February 2000. Summing up the first round of the discussion, he noted that some members, including Ms. Evatt, had advocated a more "general" general comment, while Mr. Wieruszewski had favoured a more narrowly focused approach. For his part, he had originally shared the latter view but was of course entirely in the hands of the Committee.

41. Referring to the Committee's previous discussions with the Sub-Commission on the subject of a possible third Optional Protocol making articles 9 and 14 non-derogable, he recalled that the Committee had opposed the Sub-Commission's suggestion to that effect and, by so doing, had committed itself to developing its position on the question of non-derogable rights,

especially those related to articles 9 and 14. As to the respective significance of the terms "suspension" and "derogation", he thought that no right could be suspended in its entirety even where a state of emergency was legitimate and had been officially proclaimed; the State concerned could only derogate from some of its obligations under certain rights. By proceeding on the basis of that distinction it should be possible to find a solution to the linguistic problem arising in Spanish.

42. Lastly, referring to a point raised by Mr. Klein, he said that to describe certain rights as non-derogable was to say that those rights had some non-derogable elements or aspects. For example, when derogating from certain obligations under article 12 of the Covenant, States could not invoke article 4 as justification for such measures as, for example, forced displacement of entire populations.

43. The CHAIRPERSON, concluding the first round of the debate, remarked that slight confusion seemed to have arisen from the fact that the draft before the Committee had two titles. Not all members had immediately realized that the subject matter was, in fact, restricted to the question of non-derogable rights under the Covenant.

ORGANIZATIONAL AND OTHER MATTERS (agenda item 4) (continued)

44. The CHAIRPERSON said that, in accordance with the Committee's instructions, she had sent a note verbale to the Government of Peru strongly urging that a delegation should be present at the Committee's sixty-eighth session (March 2000) in order to participate in the consideration of Peru's fourth periodic report. The Peruvian Government had now addressed a note to the Secretary-General expressing its appreciation of the Committee's understanding and explaining that it would not be able to send a delegation until the second half of the year 2000. Having considered the situation, the Bureau wished to suggest that Peru should be replaced by Afghanistan in the timetable for the sixty-eighth session. It would be recalled that a list of issues had already been prepared in connection with the consideration of Afghanistan's second periodic report, which had been scheduled for 1990. On that occasion, the Committee had decided to suspend consideration of the report because the two representatives sent by the Mission of Afghanistan to attend the session had explained that they were not in a position to reply to questions.

45. Mr. SOLARI YRIGOYEN said that he was perturbed by Peru's refusal to attend the next session and, in particular, by the fact that the Peruvian Government had thought fit to express its appreciation of the Committee's understanding. The forthcoming presidential election in Peru was quite undemocratic, the President being a candidate for a third time - in flagrant contravention of the Constitution. The Government that would be in power in the second half of the year 2000 was therefore likely to be a highly questionable one. Any suspicion of connivance on the part of the Committee should be strictly avoided.

46. The CHAIRPERSON explained that, in her note verbale, she had said that if the Peruvian delegation could not come on a certain date in March 2000, an alternative date could be made available in the same month. That was the extent of the "understanding" shown by the Committee.

47. Mr. ANDO, recalling that he had been Chairperson when the Committee had decided to suspend its consideration of the report of Afghanistan, wondered whether a constructive dialogue with Afghanistan could be expected in view of the present situation in that country.

48. Mr. AMOR suggested that the Committee should hold a debate on Afghanistan whether or not the Government in power sent a delegation. The human rights situation in that country was known to be intolerable, especially with regard to women's rights. The appropriate notification should be sent to the official representative of Afghanistan at United Nations Headquarters.

49. Referring to Mr. Solari Yrigoyen's remarks concerning Peru, he said that the Peruvian Government's decision not to be represented at the March 2000 session but to send a delegation later at a time that suited its convenience could not be accepted in silence. Some expression of regret at the State party's lack of cooperation was called for.

50. Mr. YALDEN remarked that in its 20 years of existence the Committee had surely known many cases of delegations cancelling or postponing their attendance.

51. Ms. EVATT confirmed that there had been a number of such cases. The Committee had usually sought to accommodate the State party by suggesting another date.

52. Mr. KLEIN suggested that Peru should be invited to send a delegation in July 2000 if the Committee's workload permitted. He accepted the Bureau's proposal to replace Peru by Afghanistan in the timetable for the sixty-eighth session.

53. Mr. SOLARI YRIGOYEN said that he had no objection to setting a new date for the consideration of the fourth periodic report of Peru but continued to feel that the Committee should express regret at the State party's refusal to attend in March 2000. It was important to show other countries in the region that attempts to withdraw from international monitoring did not go unnoticed. With regard to Afghanistan, he pointed out that the present Government was not recognized by the United Nations; the Ambassador was a representative of the former regime and was bound to be highly critical of the present situation. Could a fruitful dialogue take place in such circumstances?

54. The CHAIRPERSON said that clearly the Committee could only discuss the report of Afghanistan with a delegation of representatives of a recognized Government. It would have to see what the outcome would be in that regard. In the meantime, she took it that it was the wish of the Committee to schedule consideration of the report of Afghanistan for March 2000.

55. It was so decided.

56. The CHAIRPERSON invited views on the schedule for the year 2000. She reminded the Committee that less time would be available at the July session because of the need to consider the annual report, and because one of the countries scheduled, Australia, was submitting two reports. Some members had suggested that the report of Peru should also be dealt with in July, but she herself considered that that would complicate the Committee's work unduly.

57. Ms. CHANET said she did not think five reports would be too much for the Committee to deal with. Peru had already asked for a postponement, and its report ought to be scheduled for July so as to send a message to the Government that it could not simply choose a date to suit itself.

58. Lord COLVILLE feared that if that was done, very little time would be left for communications. He was very concerned about the backlog in that respect, and would like to know from the secretariat how many communications were likely to be ready for consideration by July.

59. Ms. MORALES (Secretariat) said that only two staff members were assigned to communications, and thus much would depend on the situation within the secretariat. However, if it was the wish of the Committee, the secretariat could concentrate on communications rather than on reports of States parties.

60. Mr. KLEIN said it had in the past been understood that the Committee would deal with States' reports in New York, and concentrate more on communications at its July session in Geneva. In view of the need not to overload the timetable, he would withdraw his proposal that the report of Peru should be considered in July.

61. Ms. CHANET said that in view of the fact that there were already substantial delays in dealing with reports, and that some were only taken up two and a half years after they had been submitted, the Committee could not allow itself only four reports at the July session. The annual report and the concluding observations need not take more than a day. She maintained her view that five reports should be scheduled.

62. Mr. SCHEININ agreed that more time should be reserved for communications. Thanks to an improvement in its procedures, the Committee was in fact coping fairly successfully with its backlog of reports.

63. The CHAIRPERSON, in reply to a point raised by Lord Colville, said she took it that it was the wish of the Committee to request the secretariat to prepare as many communications as possible for consideration at the July session.

64. It was so decided.

65. Mr. WIERUSZEWSKI asked what decision had been taken regarding Yugoslavia. Although the report submitted by that country was far from satisfactory, he felt that the Committee could not remain silent on the matter and should at least request a supplementary report.

66. Ms. EVATT said that for her part she would feel extremely unhappy at having to consider a report submitted to the Committee by a Head of State who was under indictment as a war criminal. She did not think any decision needed to be taken on the issue.

67. The CHAIRPERSON suggested that the position of the Committee in that regard could be discussed at a closed meeting.

68. It was so decided.

69. Mr. HENKIN proposed that the Committee should adopt the approach that the reporting obligations of a State party should not be limited to a single report. Responses to specific questions raised in the concluding observations should be provided at intervals, independently of the report.

70. The CHAIRPERSON suggested that a small working group should be set up to consider that proposal. Another working group could be set up to study how the situation in regard to communications could be improved.

71. She took it that it was the wish of the Committee to schedule consideration of the reports of Argentina, Denmark, Gabon, Peru, Trinidad and Tobago and Uzbekistan for October 2000. The dates for submission of new periodic reports by countries whose reports had just been considered would be 2004 for Norway, 2003 for Morocco, 2003 for the Republic of Korea and 2001 for Macau.

72. It was so decided.

The public part of the meeting rose at 12.40 p.m.